

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

UNITED STATES OF AMERICA,) 4:10CR3123
)
)
Plaintiff,)
)
)
v.) **MEMORANDUM**
)
) **AND ORDER**
WILLIE CURRY,)
)
)
Defendant.)

This matter is before the court on the defendant's notice of appeal (filing [81](#)), motion for Certificate of Appealability (filing [82](#)) and the clerk's recent memo (filing [84](#)) asking whether the defendant may proceed in forma pauperis and whether a certificate of appealability will issue. The pro se notice of appeal is filed with reference to the judgment entered on February 29, 2012 (filing [79](#)), which denied the defendant's motion to vacate pursuant to [28 U.S.C. § 2255](#).

Before the defendant's appeal can proceed, a certificate of appealability must issue. *See Fed. R. App. P. 22(b)*. A certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." [28 U.S.C. § 2253\(c\)\(2\)](#). When a district court has rejected a constitutional claim on the merits in the course of denying a § 2255 motion, "[t]he petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong" in order to meet the standard contained in § 2253(c). [Slack v. McDaniel, 529 U.S. 473, 484 \(2000\)](#). In contrast, when a district court denies a § 2255 motion on procedural grounds without reaching the applicant's underlying constitutional claims on the merits, a certificate of appealability should issue under § 2253(c) when "the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.*

For the reasons set forth in the memorandum and order that was entered on February 29, 2012 (filing [78](#)), the court concludes that the defendant has not made a substantial showing of the denial of a constitutional right as required by [28 U.S.C. § 2253\(c\)](#). Therefore, a certificate of appealability will not be issued.

Because the defendant was previously permitted to proceed in forma pauperis on his § 2255 motion, and because the appeal appears to be taken in good faith, even though a certificate of appealability will not be issued, the defendant may proceed in forma pauperis on appeal pursuant to [Federal Rule of Appellate Procedure 24\(a\)\(3\)](#).

IT IS ORDERED that:

1. The defendant's motion for certificate of appealability (filing [82](#)) is denied and a certificate of appealability will not issue in this case.
2. The defendant may proceed in forma pauperis on appeal.
3. The clerk of the court shall transmit a copy of this memorandum and order to the United States Court of Appeals for the Eighth Circuit.

DATED this 26th day of March, 2012.

BY THE COURT:

Richard G. Kopf
Senior United States District Judge

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